IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; and CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES,

Petitioners,

VS.

VAN DAVIS, HERSHEL CLADY, and FRED VEGA, individually and on behalf of all others similarly situated, WILLIE BURSEY, ELIJAH HARRIS, JAMES W. SMITH, WILLIAM CLADY, STEPHEN HAYNES, JIMMIE ROY TUCKER, LEON AUBRY, RONALD CRAWFORD, JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO A. AMPARAH, individually and on behalf of all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF AMICI CURIAE

INCORPORATED MEXICAN AMERICAN GOVERNMENT EMPLOYEES, LEAGUE OF UNITED LATIN AMERICAN CITIZENS, AMERICAN G.I. FORUM, S.E.R.–JOBS FOR PROGRESS, INC.

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Respondents.

BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

The Incorporated Mexican American Government Employees (IMAGE) is a national organization concerned with the public employment of Hispanic Americans, Mexican Americans, Cuban Americans, Puerto Ricans, Central-South Americans, and all those of Hispanic cultural/linguistic heritage. With close to 70 affiliates chartered in 25 states, IMAGE is incorporated in the District of Columbia. IMAGE was created because of the substantial underrepresentation of Hispanics in federal, state, and local employment. For example, although Hispanic Americans comprise over 7% of

the national population, they hold only 3.5% of the 2.4 million federal jobs, 2.4% of the 1.5 million state jobs, and 4.1% of the 2.5 million local/municipal jobs.

The League of United Latin American Citizens (LULAC) is a national civil rights organization with social and cultural functions. Its 50th anniversary year, 1978, has been spent continuing the development of an equitable share of job opportunities for Hispanics. LULAC has been responsible for the formation of Operation SER, the largest Hispanic training program in the country.

The American G.I. Forum is a veteran's family organization composed primarily of Mexican Americans. It had

its beginnings after World War II in the aspirations of returning Mexican American veterans to end the discriminatory social, economic, and political practices that pervaded this country. The organization now has chapters nationwide. One of the main goals of the Forum is the improvement of employment opportunity.

SER-Jobs for Progress, Inc., (SER), is a nonprofit Texas corporation, has been providing employment and training services to economically disadvantaged Hispanics throughout the United States for the past decade. National SER is providing $2.7 million in training and technical assistance to some sixty local SER/CETA program service deliverers. There are several local SER program

operators that provided employment and training services to economically disadvantaged unemployed residents of the County of Los Angeles. Each of the SER operators, on at least one occasion, has referred qualified Hispanic CETA applicants to the Los Angeles County Fire Department.

QUESTIONS PRESENTED

1. Is Proof of Purposeful Intent to Discriminate Necessary to Make Out a Violation Under 42 U.S.C. §1981?

2. Did the Trial Court Exceed Its Jurisdiction in Fashioning the Remedial Hiring Order in the Judgement Below?

STATEMENT OF THE CASE

Amici rely upon Respondents to set out the factual setting of this case.

ARGUMENT

Amici curiae respectfully urge that the decision below be affirmed; the clear language of the statute, the legislative history, and the relevant case law establish that all discrimination abridging the rights enumerated therein are prohibited under 42 U.S.C. §1981. Consequently, the Court correctly found liability on the part of Petitioners and instituted the remedial hiring order to overcome the discrimination found to exist.

The first question presented in

this case is whether purposeful intent to discriminate need be demonstrated in order to establish a violation under §1981. Amici agree with the trial court, the Ninth Circuit Court of Appeals, and Respondent herein, that an unrebutted showing of adverse impact on Mexican Americans and blacks resulting from selection procedures utilized by the Petitioner is sufficient to establish liability under §1981. Such a result is consistent with the standard of proof of liability under Title VII, 42 U.S.C. §2000(e), et seq.

The second question presented herein is the appropriateness of the remedy ordered below. Amici respectfully submit that federal courts have well recognized broad powers to fashion remedies to end discriminatory conduct

on the part of public entities. Moreover, federal courts are under a duty to order relief which will not only prohibit future discriminatory conduct but also eradicate the present effects of past discrimination.

I. UNDER 42 U.S.C. §1981, A PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION CAN BE ESTABLISHED THROUGH A DEMONSTRATION OF ADVERSE IMPACT; PURPOSEFUL INTENT TO DISCRIMINATE NEED NOT BE PROVED.

The Ninth Circuit Court of Appeals, in its opinion below, held that:

". . .[T]here remains no operational distinction in this context between liability based upon Title VII and §1981." 566 F.2d at 1340.

The Court in effect held that a plain-

tiff under 42 U.S.C. §1981 need not prove purposeful intent to discriminate in order to establish a prima facie case; Respondents were required only to demonstrate that the challenged employment practice had a disproportionate adverse impact on the employment contract rights of Mexican American and black applicants.[1]

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[1] The question of racial animus was not at issue; at the time the trial court reached its decision, this Court had not yet handed down its opinion in Washington v. Davis, 426 U.S. 229 (1976).

At the trial level Respondents demonstrated that in 1969, and again in 1972, Petitioners utilized an unvalidated written aptitude test to rank applicants for positions as firefighters. Both the trial and the Court of Appeals found that the written examinations had an adverse impact on minority applicants. Davis v. County of Los Angeles, 8 F.E.P. Cases 239, 240 (C.D. Cal. 1973), 566 F.2d 1334, 1341, (9th Cir., 1977). In 1969 only seven (7%) of the 100 Mexican American applicants who took the exam were hired; of the 244 blacks who took the exam, (cont. next page)

The result of the Circuit Court's holding is to harmonize the standard of liability under §1981 with the standard under Title VII.[2]

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just five (or 2%) were hired. By comparison, 175 out of 1,080 (16.2%) white applicants who took the exam were employed by Petitioners. Though Mexican American and black applicants comprised approximately 25% of the group examined, they made up only 6.4% of those hired. Additionally, approximately 16% of white examinees were hired, compared to 7.02% of minority examinees.

The 1972 written exam had a similar impact. Among the top 544 scorers were 25.8% of the white applicants, 11% of the Mexican American applicants, and only 5.1% of the black applicants. 566 F.2d at 1337. Despite this severely disproportionate impact on minorities, no effort was made to validate the tests. 566 F. 2d at 1341.

[2] 42 U.S.C. §2000(e) et seq. Under the guidelines established in Griggs v. Duke Power Co., 401 U.S. 424 (1971), a prima facie case of discrimination can be established pursuant to Title VII by a demonstration that a challenged employment practice or procedure has a disproportionate impact on the employment opportunities of a protected class. Once such a prima facie case is (cont. next page)

Petitioners contend that the Court's opinion in Washington v. Davis, 426 U.S. 229 (1976), requires proof of purposeful intent to discriminate in order to make out a violation under §1981. However, the decision in Washington v. Davis did not address the question of statutory liability under §1981, but only dealt with the question of whether Title VII standards, with regard to adverse impact and a prima facie showing of discrimination, could be applied in the circumstance of a constitutional challenge. 426 U.S. at 247. Therefore, the question of whether purposeful intent to discriminate is

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established, the burden shifts to the employer to come forward with a legitimate and necessary business reason which is advanced by the challenged practice. Furnco v. Waters, ___U.S.___, 57 L.Ed.2d 957 (1978).

necessary to make out a violation under §1981 is before the Court for the first time.

A. THE PLAIN TERMS OF 42 U.S.C. §1981 AND ITS AFFIRMATIVE NATURE OUTLAW ALL DISCRIMINATION INFRINGING ON THE RIGHTS ENUMERATED THEREIN.

The terms of §1981 support the position that intent is not an element of the statutory violation. 42 U.S.C. §1981 reads:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and

property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactations of every kind, and to no other." [Emphasis added].

On its face, §1981 is an affirmative guarantee of rights. The plain language of §1981 reflects the congressional intent to outlaw all discrimination infringing on the rights enumerated therein, including the right to contract for employment.[3]

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[3] See generally, McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976); Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Garner v. Giarrusso, 571 F.2d 1330 (5th Cir. 1978); Sethy v. Alameda County Water District, 545 F.2d 1157 (9th Cir. 1976) (en banc).

By its terms, §1981 is not limited to redressing only those denials of rights by practices or state law which are the product of blatant racial animus. The broad language of §1981 that "all persons...shall have the same right" also encompasses the unequal availability of rights resulting from subtle or facially neutral, yet equally discriminatory, practices.

Actions and practices not mandated by state laws and which apply to whites as well as non-whites may nevertheless impinge on the rights of racial and ethnic minorities to contract as severely as a blatantly racially motivated law. The fact that Congress intended blacks and other ethnic minorities to have the same rights meant those rights afforded were to be available in fact,

not just in name. Section 1981 by its language is very clearly an "effects" oriented statute. It does not state that all persons shall have the same rights in the face of racially motivated acts ; it unequivocally states "all persons" shall have the same rights and any conduct infringing on those rights is unlawful.

When an action is brought pursuant to §1981, the trial court, in determining the merits of the claim, necessarily must focus on measuring whether or not the rights claimed under and enumerated in the statute are available to "all persons" in the same degree in relation to others, i.e., whites. It is only by focusing on the relative measure of rights available to individuals of different racial and ethnic groups

that the Court can determine whether the guarantees of §1981 have been breached.

The question of racial animus is not the determinative issue under §1981. Racial animus or motivation is properly an issue when a statute prohibits specified conduct. This is the case under §1983, which derives from the Civil Rights Act of 1871 and the Fourteenth Amendment.[4]

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[4] Section 1981's predecessor, §1 of the Civil Rights Act of 1866. was reenacted in the Enforcement Act of 1870. That Act was intended to implement the 14th Amendment. However, Congress did not intend by the reenactment to change the goals or interpretations of the provisions. The aim of Congress in including §1, along with other sections of the 1866 Act, into the Enforcement Act of 1870, was to provide machinery for putting the 1870 Act into motion. Cong. Globe, 41st Cong., 2d Sess. 3560 (Sen. Stewart); cf. Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1160 n. 4 (9th Cir. 1976) (en banc); Jones v. Alfred Mayer Co., 392 U.S. 409 (1968); Young v. International Tel. & Tel. Co., 438 F.2d 757, 759-60 (3rd Cir. 1971).

However, when a statute such as §1981 guarantees rights to individuals the focus is on whether conduct, law, or practices infringe on those rights; the question is not whether the discrimination was purposeful but whether it existed.

Consequently, under the terms of §1981, it is enough that employment discrimination plaintiffs isolate and identify actions or practices that have an adverse impact on their right to gain employment, or that there is a disparity based on race or ethnicity. They need not show that defendants intended to affect minorities adversely.

B. THIS COURT HAS BROADLY CONSTRUED THE LANGUAGE OF THE 1866 CIVIL RIGHTS ACT TO PROHIBIT ALL

DISCRIMINATION IN CONTRACTS AGAINST ANY PERSONS OR GROUPS. THIS CONSTRUCTION IS CONSISTENT WITH THE INTENT OF CONGRESS IN ENACTING THE CIVIL RIGHTS ACT OF 1866.

It is clear beyond dispute that the guarantees of §1981 apply to employment contracts. The Court in Johnson v. Railway Express Agency, 421 U.S. 454 (1975), joined the Courts of Appeals in holding that §1981 affords a federal remedy against discrimination in private employment. 421 U.S. at 460-64. Public entities as well are subject to the coverage of §1981 with regard to employment. Garner v. Giarrusso, 571 F.2d 1330 (5th Cir. 1978); Sethy v. Alameda County Water District, 545 F.2d 1157

(9th Cir. 1976) (en banc).

Although §§1981 and 1982 were long neglected as a means of redressing discrimination, courts have recently recognized the sweeping protections intended by the Congress in the enactment of the Civil Rights Act of 1866, from which both §§1981 and 1982 derive.

Section 1981 derives from §1 of the Civil Rights Act of 1866.[5] Although the immediate impetus for the passage of the 1866 Act was to give effect to

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[5] Hereinafter referred to as the "1866 Act". Act of April 9, 1866, c. 31, 14 Stat. 27. Section 1 of the Act was reenacted in the Enforcement Act of 1870. Act of May 31, 1870, c. 16, 16 Stat. 44, and was codified as §1977 of the Revised Statutes of 1874.

the Thirteenth Amendment,[6] it was recognized even then by opponents as well as proponents of the bill that the 1866 Act had a broader reach than would have been necessary to meet the particular and immediate plight of the newly freed Negro slaves. Accordingly, §§1981 and 1982 have been read to prohibit private discrimination in the sale of property, Jones v. Alfred Mayer Company, 392 U.S. 409 (1968), employment discrimination against whites, McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273

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[6] In introducing the bill, Senator Trumbull remarked:

"This measure is intended to give practical effect to that declaration [the Thirteenth Amendment] and secure to all persons within the United States practical freedom." Cong. Globe, 39th Cong., 1st Sess. 474.

(1976), and aliens, Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974), as well as blacks, and discrimination by private schools in excluding black children. Runyon v. McCary, 427 U.S. 160 (1976). This is in keeping with the sponsors' view that "...[T]he very object of the bill (the 1866 Act) is to break down all discrimination..."[7]

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[7] Senator Trumbull stated near the end of Senate debates on the measure:

"Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the rights to buy and sell, and enjoy liberty and happiness. ...a bill, the only object of which is to secure equal rights to all the citizens of the country, a bill that protects a white man just as much as a black man. With what consistency and with what face can a Senator in his place here say to the Senate and to the Country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when the very
(cont. next page)

Opponents of the bill criticized the bill on this very basis, charging that it would sweep too broadly and invalidate any and all statutes which made a distinction based on race. In the House, Representative Kerr opposed the bill partly because its reach would extend to laws in any state making discrimination on the basis of race for purposes such as licensing illegal. He noted as he read that the bill, an Indiana statute allowing only whites to engage in the retail liquor business, would be invalid and those who attempted to uphold it would be liable under the Act.[8]

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object of the bill is to break down all discrimination between black men and white men." (emphasis added). Cong. Globe, 39th Congress, 1st Sess. at 599.

[8] Cong. Globe, 39th Congress, 1st Sess. 1271.

On the Senate side, Mr. Johnson argued against the bill by stating that laws in any state, including those outside the South, prohibiting marriage contracts between blacks and whites would be invalidated by the Act, even if such were not an intended purpose of the bill.[9]

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[9] Mr. Johnson stated:

"I mention that for the purpose of applying it to one of the provisions of the bill. What is to be its application? There is not a State in which these negroes are to found where slavery existed until recently, and I am not sure that there is not the same legislation in some of the States where slavery has long since been abolished, which does not make it criminal for a black man to marry a white woman, or for a white man to marry a black woman; ... Do you not repeal all that legislation by this bill? I do not know that you intend to repeal it; but it is not clear that all such legislation will be repealed...?" Id. at 505.

Consistent with the intent of Congress to enact a sweeping measure, this Court and lower federal courts have read the operative language of §§ 1981 and 1982 broadly.

The seminal case by the Court involving the reach of the statutes deriving from Section 1 of the Civil Rights Act of 1866 is the Court's decision in Jones v. Alfred Mayer Co., 392 U.S. 409 (1968) in which private racial discrimination in the sale or rental of real or personal property was held prohibited by § 1982. The Court in Jones reasoned that Congress intended just what the terms of the 1866 Act suggest:

> "To prohibit all racial discrimination, whether or not under the color of law, with respect to the rights enumerated therein - including the right to purchase or lease

property." 391 U.S. at 436.

More recently, the Court relied upon the holding in Jones to find that § 1981 prohibits private schools from excluding qualified children solely because they are black. In Runyon v. McCary, 427 U.S. 160 (1976), the Court found that the practice of excluding black children from schools, which advertised and offered educational services to the public, was a classic violation of § 1981. The Court reached that conclusion in the face of arguments asserting constitutional rights to privacy and freedom of association. The Court in Runyon noted that both §§ 1981 and 1982 derive from § 1 of the Civil Rights Act of 1866 and that the Court's reasoning for its decision in Jones, prohibiting private racial discrimination in the sale of property, was equally applicable to racial discrimination

by private schools. The Court in Runyon specifically cited the broad holding in Jones that the 1866 Act was designed to prohibit all racial discrimination.

The Court has also read the language of the 1866 Act broadly with regard to the persons benefited by the guarantees of the statute. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) held that § 1981 prohibits racial discrimination in private employment against whites as well as non-whites. The Court in McDonald relied on both the plain language of § 1981 and the legislative history of the 1866 Act for its holding that the statute "explicitly applies to 'all persons' (emphasis added) including white persons." 427 U.S. at 287. In its discussion of the legislative history of the 1866 Act, the Court noted that the immediate impetus for the bill

was the necessity for effective relief of the newly freed black slaves, but went on to hold that:

> "...the general discussion of the scope of the Bill did not circumscribe its broad language to that limited goal. (On the contrary, the Bill was routinely viewed, by its opponents and supporters alike, as applying to the civil rights of whites as well as nonwhites.)" 427 U.S. at 289.

Similarly, the protection of §1981 has been held on several occasions to apply to aliens. In Graham v. Richardson, 403 U.S. 365 (1971), this Court held that state laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with both national policies on immigration constitutionally committed to the Federal Government and §1981's declaration that "...all persons shall have the same rights in

every state and territory. . . to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens..." 403 U.S. at 372. The Fifth Circuit in Guerra v. Manchester Terminal Corporation, 498 F.2d 641 (5th Cir. 1974) held that employment discrimination against aliens is similarly prohibited by § 1981.

C. THE SHARED PURPOSE OF § 1981 AND TITLE VII - TO END ALL EMPLOYMENT DISCRIMINATION - REQUIRES THAT THE TWO STATUTES BE HARMONIZED ON THE QUESTION OF PROOF OF LIABILITY.

Section 1981 is widely recognized by this and lower federal courts as an important means of combating employment discrimination as well as a wide range

of other discriminatory conduct. As is true under Title VII, a person making out a case under § 1981 has available a spectrum of remedies to redress employment discrimination. Johnson v. Railway Express Agency, supra, at 460. To require that plaintiffs prove purposeful intent to discriminate on the part of defendants in order to make out a violation under § 1981 would greatly reduce its availability as an effective tool for Mexican American and other historically disadvantages ethnic and racial groups. Moreover, such a requirement would create confusion in the area of employment discrimination law by requiring a different standard of proof under the two most important statutory remedies available to an aggrieved party.

Petitioners argue that § 1981 should be harmonized with §§ 1983 and 1985 on

the standard of proof required to make out a violation under each of the respective statutes.[10]

Petitioners argue that both §1983 and §1985 require proof of purposeful intent in order to establish liability

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[10] Petitioners also cite Jones v. Alfred Mayer Co., 392 U.S. 409 (1968), for the proposition that §1982 also requires proof of purposeful intent to establish liability thereunder. Petitioners' reliance is misplaced; in Jones the Court was presented with factual circumstances where purposeful intent was clearly present. The Court has never addressed a factual setting where liability under §1982 was claimed without a demonstration of purposeful intent. Amici would argue that, given the nature of §1982 and its historical relation with §1981, purposeful intent would not be required where a facially neutral practice had a disproportionate adverse impact on the rights of blacks, Mexican Americans, or whites to buy or sell real or personal property. But that issue is not presented here.

under either.[11] However, an examination of the statutes reveals a crucial distinction between §1981 and §§1983 and 1985.

As indicated earlier, §1981 is affirmative in nature; it was enacted to effectively implement the Thirteenth Amendment's mandate to end all vestiges of involuntary servitude, and by its language guarantees the same enjoyment of

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[11] Proof of purposeful intent may be required under §1983 after the Court's decision in Washington v. Davis, supra, where the right alleged to have been abridged derives from the Constitution. However, it is unclear whether the same requirement would apply if an action brought under §1983 claimed the violation of a statutory right rather than one of a constitutional nature. Therefore, Petitioners' broad assertion that purposeful intent is required under §1983 is not entirely justified.

Section 1985, on the other hand, by its very language, requires a showing of purpose in order to make out a violation under that anti-conspiracy statute.
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the rights enumerated therein to "all persons". Sections 1983 and 1985, on the other hand, are prohibitory in nature. They focus not on the measure of rights to be enjoyed by persons seeking protection thereunder, but rather are explicit bans against discriminatory conduct by individuals. Consequently, in determining liability under those statutes, courts must examine the nature of the action of the particular individual, including the person's motivation for engaging in the questioned conduct.

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"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving..." 42 U.S.C. §1985(3). (emphasis added)

See also, Griffin v. Breckenridge, 403 U.S. 88, 96-97 (1971).

This view is also consistent with the divergent history of the respective statutes. Sections 1983 and 1985 had their genesis in the Civil Rights Act of 1871,[12] which was enacted as a federal prohibition against conduct violative of the Fourteenth Amendment. By contrast, §1981 derives from the Civil Rights Act of 1866, which was enacted to effectively secure the guarantees of the Thirteenth Amendment.[13]

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[12] Civil Rights Act of 1871, 17 Stat. 13. See Monell v. New York City Department of Social Services, ___ U.S. ____, 56 L.Ed.2d 611 (1977); Griffin v. Breckenridge, 403 U.S. 88, 98-99 (1971).

[13] Although §1 of the 1866 Act was reenacted in the Enforcement Act of 1870, Congress did not intend the reenactment to change the goals or interpretations of the provision. Section 1 was included as a means of providing a mechanism for putting the 1870 Act into motion. Cong. Globe, 41st Cong., 2d Sess. 3560 (Sen. Stewart); see also note 4, supra, at 17.

The difference in the purposes to be served by the respective statutes argues against the need for them to require the same standard of proof to make out a violation under each.

A more forceful argument can be made for §1981 to be read in harmony with Title VII, which does not require proof of purposeful intent to discriminate. Congress, in enacting Title VII as a mechanism to deal with employment discrimination on the basis of race, national origin, religion, and sex, did not intend to eliminate §1981 as a means of combating employment discrimination on the basis of race, ethnicity, and alienage.[14]

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[14] While amending Title VII in 1972 to include public employers, Congress specifically rejected an amendment which would have deprived a claimant of any right to sue under §1981. 118 Cong. Rec. 3371-3373 (1971).
(cont. next page)

As this Court has observed in the past, §1981 and Title VII are directed to most of the same ends. Johnson v. Railway Express Agency, 421 U.S. at 461. Rather than being mutually exclusive, the two statutes augment one another and provide overlapping and related remedies against employment discrimination. Johnson v. Railway Express Agency, 421 U.S. at 459. Consequently, the standards for proof of liability under the two statutes

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14 (cont. from last page)
See also comments of Senator Williams in support of the need for retaining §1981 as a remedy to employment discrimination:

"This is especially true where the legal issues under other laws may not fall within the scope of Title VII or where the employee, employer, or labor organization does not fall within the jurisdictional confines of Title VII. These situations do exist, and I am sure that it is unnecessary to spell them out at this point." Id. at 3372.

should be harmonized. Proof of discriminatory impact against an identifiable and protected group should be sufficient to demonstrate a prima facie case of discrimination under §1981, as is the case for groups protected by Title VII.

It is important to note here that such a showing of adverse impact does not constitute resolution on the ultimate issue of liability, but rather shifts the burden to an employer to demonstrate a legitimate business reason for the use of the particular practice which is challenged. Furnco Construction Corp. v. Waters, 57 L.Ed. 2d, at 967. If the employer can do so, then the plaintiff has an opportunity to show that "the proffered justification is merely a pretext for discrimination." Furnco Construction Corp. v. Waters, supra, at

968. But if the employer fails to come forward with a legitimate business reason for the use of the challenged procedure or practice, the prima facie showing will be determinative. (See generally, International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); Griggs v. Duke Power Co., supra.)

Such harmony will protect both employers and employees. It will allow groups subject to discrimination on a basis other than those covered by Title VII to receive protection. It will also allow protection for individuals against discriminatory conduct by employers who are not under the coverage of Title VII. With regard to employers, they will be judged pursuant to a single standard of conduct. They would be subject to liability or free of liability under either

statute according to one rule. Consequently, they need not confront the dilemma of being in compliance under one statute and out of compliance under another.

II. THE ISSUANCE OF THE REMEDIAL HIRING ORDER HEREIN WAS WITHIN THE JURISDICTION OF THE DISTRICT COURT.

The second question presented in this case is whether the District Court exceed its jurisdiction when it issued a mandatory interim hiring order to remain in effect until such time as the percentage of Mexican Americans and blacks employed by the Los Angeles County Fire Department approximated the percentage of those groups in the general population of Los Angeles County.

It is important to note that Petitioners here do not, and this case does not, require consideration of the broad question of when affirmative action or quota hiring is proper. Petitioners challenge whether the circumstances of this case, on these facts, make the mandatory hiring ordered by the trial court appropriate. As to the broader question, lower courts are unanimous that both affirmative action and quota hiring are available as remedies for past discrimination in appropriate circumstances.

This Court has on numerous occasions noted that federal courts have been armed with broad powers to fashion remedies in cases involving employment discrimination in violation of Title VII, Albermarle Paper Co. v. Moody, 422 U.S. 405, 418

(1975); Franks v. Bowman, 424 U.S. 747, 763 (1976); cf United Jewish Organizations of Williamsburgh v. Carey, 430 U.S. 144 (1977). including equitable powers with their historic purpose of securing "complete justice." Albermarle, supra, 422 U.S. at 418. Likewise, this Court and lower federal courts have consistently recognized the power available under §1981 to fashion the full range of legal and equitable remedies, Johnson, supra; see also Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 243 (5th Cir. 1974), to overcome barriers to equal right to contract for employment.

A district court in determining the specific remedy to be afforded in an employment discrimination case is "to fashion such relief as the particular circumstances of a case may require to effect restitution." Internat'l. Bro-

therhood of Teamsters v. United States, 431 U.S. 324, 364 (1977), citations omitted. In addition:

> "Where racial discrimination is concerned, 'the (district) court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' Louisiana v. United States, 380 U.S. 145, 154 (1965)." 422 U.S. at 418.

The use of mathematical ratios in shaping a remedy has been recognized by the Courts as well within the equitable remedial power and discretion of the federal courts. Swann v. Charlotte-Mecklenburg Board of Supervisors, 402 U.S. 1, 25 (1971). Eight Courts of Appeals have considered and approved the exercise of this discretion and power in the formulation of accelerated hiring goals or quotas to eradicate the effects of past

discrimination. See:

Boston Chapter NAACP, Inc., v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975) (§§1981 and 1983, Title VII);

Vulcan Society v. Civil Service Commission, 490 F.2d 387 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974) (Title VII);

Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (§1983);

Rios v. Enterprise Ass'n. Steamfitters Local 638, 501 F.2d 622 (2nd Cir. 1974) (Title VII);

Bridgeport Guardians, Inc. v. Civil Service Commission, 482 F.2d 1333 (2nd Cir. 1973), cert. denied, 421 U.S. 991 (1975) (§§1981, 1983);

United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir. 1973), cert. denied, 412 U.S. 939 (1973) (Title VII);

Pennsylvania v. O'Neill, 473 F.2d 1029 (3rd Cir. 1973) (en banc) (§1983);

Contractors Ass'n. of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971), cert. denied, 404 U.S. 854 (1971) (Title VII);

Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1974), modified 424 U.S. 747 (1976) (Title VII);

Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (en banc), cert. denied, 419 U.S. 895 (1974) (§1983);

Asbestos Workers v. Volger, 407 F.2d 1047 (5th Cir. 1969) (Title VII);

United States v. Masonry Contractors Ass'n. of Memphis, Inc., 497 F.2d 871 (6th Cir. 1974) (Title VII);

United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973) (Title VII);

United States v. Carpenters Local 169, 457 F.2d 211 (7th Cir. 1972), cert. denied, 409 U.S. 851 (1972) (Title VII);

United States v. N.L. Industries, 479 F.2d 354 (8th Cir. 1973) (en banc) (§1983);

Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950 (1972) (§1983);

United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971) (Title VII);

Such accel rated hiring orders do not conflict with §703(j) of Title VII, 42 U.S.C. §2000(e)(2)(c). Section 703(j) in pertinent part provides that an employer may not be required:

> "to grant preferential treatment to any individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race... in comparison with the total number or percentage of persons of such race...in any community."

That language was intended to bar preferential quota hiring as a means of changing racial imbalance attributable to causes other than unlawful discriminatory conduct. Rios v. Enterprise Ass'n. Steamfitters Local 638, 501 F.2d 622, 630 (2nd Cir., 1974); United States v. Wood, Wire, and Metal Lathers International Union Local 46, 471 F.2d 408, 413 (2nd Cir. 1973). Where past discrimination is shown, and

ratio hiring remedies that past discrimination, the order is not "preferential treatment" in violation of §703(j).

The Court's decision in Regents of the University of California v. Bakke, ___U.S.____, 57 L.Ed.2d 750 (1978), supports this view. The opinion of Justice Powell, expressing the Court's judgement, supports the use of affirmative hiring orders such as the one ordered by the trial court in the instant case where necessary to remedy discriminatory conduct and its effects. In Bakke, Justice Powell found that the Davis special admissions program violated the Fourteenth Amendment because it was "undeniably" a classification based on race and ethnic background which afforded preferential treatment for individuals from certain minority groups. Justice Powell found persuasive the factual circumstances

presented to the Court where there was an absence of any finding by the trial court or an admission by the University of past discriminatory conduct on the part of the University.[15] The University in Bakke had argued that the special admissions program was necessary to redress societal discrimination and that the Court in the past had validated preferential treatment in other circumstances, specifically in the areas of education, employment, and sex discrimination.

Justice Powell in his opinion pointed out that in each of the areas cited by the University as supporting the use of preferential treatment, there had been a finding of discrimination in the parti-

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[15] The University denied, and the Court assumed, that it had not discriminated in the past.

cular instances and that the preferential treatment accorded was the means chosen to remedy the discrimination found to exist. The discussion by Justice Powell of the employment cases is especially pertinent to the issue of the appropriateness of the hiring order in the instant case. The cases demonstrate that quotas are not in all circumstances unjustified preferential treatment for minority groups or reverse discrimination and therefore illegal. For example, he noted with approval Franks v. Bowman, 424 U.S. 747 (1976), wherein the Court approved a retroactive award of seniority to a class of black truck drivers who had been the victims of discrimination. Justice Powell's citation of the Franks case is significant because the remedy ordered was determined to outweigh the infringe-

ment of seniority rights of innocent white employees. The Court in Franks had determined that the need to compensate the black employees for the discrimination which had been practiced by the employer took precedent over the seniority expectations of white employees. 424 U.S. at 775-780.

Also cited by Justice Powell were two lower court decisions approving issuance of ratio hiring orders as remedies for constitutional or statutory violations resulting in identified, race-based injuries.[16] For Justice Powell,

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[16] 57 L.Ed.2d at 778, citing Bridgeport Guardians, Inc. v. Civil Service Commission, 482 F.2d 1333 (2nd Cir. 1973) (1/1 hiring ratio approved); Carter v. Gallagher, 452 F.2d 315, modified on rehearing en banc, 452 F.2d 327, 329 (8th Cir. 1972) (3/1 hiring ratio approved.)

Justice Powell's citation of the Carter v. (cont. next page)

preferential treatment is not reverse discrimination, and therefore illegal, as long as the remedy fashioned serves to correct identified discrimination found to exist by a court or responsible government agency.[17]

The concurring opinion by Justice Brennan also supports the use of remedies involving preferential treatment, such

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16 (cont. from last page)
Gallagher decision, supra, is particularly noteworthy in that it was an action brought under §1981.

17 "The courts of appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference. Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination." 57 L.Ed.2d at 778. (citations omitted, emphasis added).

as ratio hiring orders, in employment cases. In Bakke, Justice Brennan read prior decisions by the Court to approve the use of preferential treatment as a means of remedying past discrimination, including its present effects. Justice Brennan, however, also argued that such remedies were appropriate even absent a showing of specific discriminatory conduct, as long as it could be demonstrated that the action complained of had an adverse and unjustified impact upon members of racial minorities.[18] The key for Justice Brennan is that the existence of discrimination, or the present effects of

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18 Bakke, 57 L.Ed.2d at 817-818, Brennan, J., concurring, citing McDaniel v. Barresi, 402 U.S. 39 (1971); United Jewish Organizations of Williamsburgh v. Carey, 430 U.S. 144 (1977); Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Sheven, 416 U.S. 351 (1974); Katzenbach v. Morgan, 384 U.S. 641 (1966).

past discrimination, justifies taking race into account in order to fashion a remedy to effectively overcome the discrimination. Under such an analysis, the quota hiring remedy ordered by the trial court in this instance would be clearly valid.

It is important to point out here that the opinion by Justice Stevens does not adopt a position that preferential hiring orders are not appropriate remedies in employment cases. Justice Stevens, in his opinion, did not address the larger question of when race can be used as a factor in an admissions program or in other settings. His opinion was specifically limited to whether Bakke as an individual had been discriminated against on the basis of his race. Bakke, 57 L. Ed.2d at 845. (Stevens, J., concurring).

Nowhere in his opinion did Justice Stevens state or imply that preferential treatment could not be used to remedy prior discrimination. On the contrary, note 22 seems to imply that preferential treatment beyond "special recruitment policies" would be appropriate in the circumstances where a discriminatory policy was in effect.[19]

The district court held that the prospective hiring order was "necessary to overcome the presently existing existing effects of past discrimination." Davis v. County of Los

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[19] Bakke, 57 L.Ed.2d at 851, note 22. By stating that "affirmative action" refers to "special recruitment policies" where no discriminatory policy exists, Justice Stevens leaves open a wider definition for "affirmative action" where a discriminatory policy does exist.

The order by the district court is well within the scope of the remedies available to district courts when unlawful employment discrimination has been found.

Angeles, 8 FEP Cases 239 (C.D. Cal. 1973). The Court cited in support of its order an unrebutted prima facie case established by severe underutilization of Mexican Americans and blacks in Petitioners' workforce[20] and of Petitioners' intentional use of an unvalidated written exam.[21]

The district court's finding of discrimination in this case, affirmed by the Ninth Circuit, is sufficient basis

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[20] At the time this action was brought, the minority population of the County of Los Angeles was 29.1% of the total, 18.3% Mexican American and 10.8% black. At the same time, only 3.3% of the firefighters employed by the Petitioners were Mexican American or black. Of the Los Angeles County Fire Department workforce of 1,762 firefighters, fifty (2.8%) were Mexican American and nine (0.5%) were black. Opinion of the trial court below, 8 FEP 239, at 240.

[21] See note 1, supra, at 10-11.

for a preferential hiring order consistent with the Court's view in Bakke. Moreover, the hiring order by the district court below is well within the scope of the equitable powers and discretion of federal courts to fulfill their duty to eliminate present effects of past discriminatory conduct, while barring like discrimination in the future. Teamsters, supra, 431 U.S. at 364.

IV

CONCLUSION

The plain language, affirmative nature, and purpose to be served by §1981 require that proof of purposeful intent to discriminate need not be demonstrated to make out a violation under the statute. The severe underrepresentation of minorities in Petitioners'

labor force, combined with the use of unvalidated exam procedure which had a demonstrated adverse impact on minorities, establishes a prima facie case of discrimination under §1981, justifying the exercise of the trial court's remedial power and discretion to fashion the quota hiring order below. For the foregoing reasons, the opinion of the Ninth Circuit Court of Appeals below should be affirmed. However, if the Court finds that the Court of Appeals applied an erroneous standard below, case should be remanded for further development of the Record and the Court should withhold judgement on the question of the power of federal courts to use numerical remedial hiring orders where

appropriate and under correct standards.

Respectfully submitted,

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